IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK VANNAUSDLE, Appellant, v. PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL, PIERCE COUNTY PROSECUTING OFFICE, AND PIERCE COUNTY LAW ENFORCEMENT SUPPORT AGENCY (LESA), Respondents.	No. 36440-9-II ORDER ON RECONSIDERATION AND AMENDING OPINION

The appellant has moved for reconsideration of the court's unpublished opinion filed April 21, 2009. The court now rules as follows:

(1) The first line of the second paragraph on page 5 of the court's opinion is modified to read as follows:

> The record contains no service of the summons on the Pierce County auditor or deputy auditor.

(2) In all other respects, the motion for reconsideration is denied.

IT IS SO ORDERED

DATED this _____ day of _____, 2009.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

PENOYAR, A.C.J.

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MARK VANNAUSDLE, Appellant, v. PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL, PIERCE COUNTY PROSECUTING OFFICE, AND PIERCE COUNTY LAW ENFORCEMENT SUPPORT AGENCY (LESA), Respondents.	No. 36440-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Mark Vannausdle requested records from the Pierce County Department of Assigned Counsel (DAC), Prosecutor's Office, and Legal Enforcement Support Agency (LESA). He then filed a Public Records Act (PRA), chapter 42.56 RCW, complaint with the trial court, arguing that those subdivisions of Pierce County did not comply with his requests. He served those subdivisions with a summons and complaint by mail, instead of personally, after the trial court allowed him to do so because he is incarcerated. He never served the Pierce County auditor as RCW 4.28.080(1) strictly requires. Pierce County answered his complaint on behalf of its political subdivisions and argued repeatedly that the trial court lacked personal jurisdiction over it because Vannausdle had failed to serve the Pierce County auditor, even by

mail. The trial court rejected the defense of insufficient service of process,[1] but dismissed the PRA claims as meritless. Vannausdle appeals. We agree that the complaint had no merit because Vannausdle's requests were for trial defense counsel's files, which are not a government record,[2] and for the prosecutor's work product, which is exempt from PRA disclosure,[3] and because they contained numerous procedural errors. But we affirm on other grounds because the trial court lacked personal jurisdiction over the defendants and, therefore, lacked authority to rule on the merits.

Discretionary Review

We first note that this case is not appealable as a matter of right because the trial court never entered a final order. *See* RAP 2.2(a)(1). It submitted a memorandum letter in which it expressed its intention to dismiss the case and stated that a dismissal order was forthcoming. The court never entered that final order. *Vannausdle v. Pierce County Dep't of Assigned* Counsel, No. 06-02-11214-3, *available at* http://www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=06-2-11214-3. Later, the trial court denied Vannausdle's motion

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[1] The trial court stated in its oral ruling that "the jurisdictional issue isn't important. [Defense counsel] more or less conceded that his arguments would be the same if the County was validly served. . . . So I'm going to act as though they were validly served." Report of Proceedings at 36. In its memorandum letter, the court reasoned that "[t]he county affirmatively asserted this defense in its response and has neither waived it or acted in any manner inconsistent with the defense of lack of service of process, but did not oppose allowing Mr. Vannausdle to argue the merits of his case." 3 Clerk's Papers at 498.

[2] RCW 42.56.010(2) (defining "public record" as "any writing containing information relating to the conduct [or performance of] government . . . prepared, owned, used, or retained by any state or local agency"); *Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, ___ L. Ed. 2d ___ (2009) (public defender, acting in capacity as counsel, is not a government actor).

[3] RCW 42.56.210; *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998).

to reconsider, but that denial of reconsideration relates only to the memorandum letter and some procedural rulings. "[A] memorandum decision has no binding effect unless it is incorporated in the formal findings or conclusions." *Huzzy v. Culbert Constr. Co*., 5 Wn. App. 581, 583, 489 P.2d 749 (1971).

There is no final order in this case and it is not appealable as a matter of right. Thus, we treat the notice of appeal as a notice for discretionary review as RAP 5.1(c) mandates. And we grant discretionary review to resolve an "obvious error which would render further proceedings useless." RAP 2.3(b)(1).

Defendant

In this case, we must first identify what defendants required service. Vannausdle named as defendants the Pierce County DAC, Prosecutor's Office, and LESA. Pierce County argues that these entities are political subdivisions of Pierce County and only Pierce County could properly be sued. It is correct.

To determine whether a governmental entity is a separate legal entity that may be sued, we (1) examine the enactments that established those entities and then (2) determine whether the legal enactments allow lawsuits against the governmental entity named as a defendant. *See Roth v. Drainage Improvement Dist. No. 5*, 64 Wn.2d 586, 588, 392 P.2d 1012 (1964). The legislature created county departments of assigned counsel in chapter 36.26 RCW and Pierce County created its regional department in Pierce County Code 2.06.010(A)(11) and (L). The legislature likewise enabled county prosecutors in chapter 36.27 RCW and Pierce County authorizes its Prosecutor's Office in Pierce County Code 2.06.030(A)(2) and (C). And Pierce County established its LESA in Pierce County Code 2.68.010 through .020. None of these

statutes or ordinances provides that the Pierce County DAC, Prosecutor, or LESA are separate legal entities or that they may be sued. In contrast, the legislature specifically provided that counties may be sued. RCW 36.01.010.

The proper defendant to Vannausdle's claims was Pierce County, rather than its political subdivisions. While Pierce County could have moved to dismiss the subdivisions from the complaint for this reason, it instead chose to answer and defend the claims on behalf of those subdivisions. *See Roth*, 64 Wn.2d at 588. And Vannausdle acquiesced in Pierce County's role as defendant by naming it in the caption of his court filings. Pierce County is the only proper defendant, not the DAC, Prosecutor, and LESA.[4]

Insufficient Service Of Process

Next, we examine whether the trial court had personal jurisdiction over Pierce County when Vannausdle did not serve it with a summons and complaint. We hold that the trial court lacked jurisdiction over Pierce County which, as shown above, was the only proper defendant to this lawsuit. Thus, the court was required to dismiss Vannausdle's complaint.

We review de novo whether a complaint should be dismissed for a lack of personal jurisdiction when the underlying facts are undisputed. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 595, 849 P.2d 669 (1993). A trial court lacks personal jurisdiction over a

[4] The Pierce County Legal Information Network Exchange (LINX) and the Clerk's Papers captions also list as defendants John Hill, Richard Whitehead, and Craig Adams. Hill was Pierce County DAC's director at the time of this action, Whitehead was Vannausdle's defense counsel in his criminal case, and Adams is a Pierce County Deputy Prosecutor who is responsible for responding to that agency's PRA requests. Vannausdle did not name these three people as defendants in the caption of his complaint, they never appeared or defended the case, and the trial court never ruled that they were defendants. It appears that LINX and the Clerk's Papers captions erroneously list those three people as defendants. Our caption does not repeat this error.

defendant unless the petitioner properly serves the summons and complaint on that defendant. RCW 4.28.020; *Weber v. Associated Surgeons, PS*, 146 Wn. App. 62, 66, 189 P.3d 817 (2008). If the defendant is a county, the petitioner must personally serve "the county auditor or, during normal office hours, . . . the deputy auditor." RCW 4.28.080(1). The court must strictly construe and rigorously enforce this requirement. *See Nitardy v. Snohomish County*, 105 Wn.2d 133, 712 P.2d 296 (1986); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 708-09, 943 P.2d 341 (1997), *review denied*, 135 Wn.2d 1008 (1998); *Kain v. Grant County*, 47 Wn. App. 153, 155, 734 P.2d 514, *review denied*, 108 Wn.2d 1021 (1987).

Here, it is undisputed that Vannausdle did not serve the Pierce County auditor or deputy auditor. He mailed the summons and complaints to the Pierce County DAC, Prosecutor, and LESA but made no attempt to serve the auditor personally or by mail.[5] Accordingly, service was improper.

The trial court apparently reasoned that, even if service was improper, it has personal jurisdiction over a defendant if the defendant waives the objection and allows the petitioner to address the merits of the case.[6] This is not correct.

The common law doctrine of waiver can preclude a defendant from asserting a defense such as insufficient service of process only if (1) the defendant's counsel has been dilatory in asserting the defense or (2) invoking the defense is inconsistent with the defendant's previous behavior. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). The doctrine of

[5] The trial court permitted Vannausdle to serve the Pierce County DAC, Prosecutor, and LESA by mail rather than in person, but did not rule at that time whether service on those agencies completed proper service of process for the complaint.

[6] *See* note 1, *supra*, summarizing the trial court's ruling on this issue.

waiver "is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Further, our Supreme Court stressed the importance of raising procedural defenses "before any significant expenditures of time and money had occurred and at a time when the [plaintiff] could have remedied the defect." *King*, 146 Wn.2d at 426.

Here, Pierce County's counsel was not dilatory in asserting the defense. Counsel raised the defense in its timely answer and the entire remaining litigation spanned less than two months before the trial court ruled in Pierce County's favor on other grounds. CR 12(b)(5) (party may invoke defense of insufficient service of process in answer or by motion). This was not dilatory. The remaining question is whether Pierce County's behavior, before invoking the defense, was inconsistent with raising it.

The "inconsistency" form of waiver by conduct is exemplified in *Lybbert* in which our Supreme Court held that the county waived its lack of personal jurisdiction defense by failing to raise it in its answer or responsive pleading, by engaging in discovery over the course of several months, and by asserting the defense for the first time after the statute of limitations expired. 141 Wn.2d at 42-43. The court found it particularly significant that the Lybberts served the county with interrogatories designed to ascertain whether the county planned to rely on the defense of insufficient service of process. Had the county responded to these interrogatories in a timely fashion, the plaintiffs would have had several days to cure the defective service. *Lybbert*, 141 Wn.2d at 42.

In contrast, here Pierce County raised the defense at the first opportunity, in its timely

answer. It did not engage in discovery, which might indicate that it wished to defend the case's merits instead of pursuing its insufficient service/lack of personal jurisdiction defense. And it wrote only one brief to the court, responding to a show cause motion, discussing the case's merits. At the April 27, 2007 show cause hearing, Pierce County argued the case's merits only in response to Vannausdle's claims and the court's concerns, but it also argued that the court lacked jurisdiction because Vannausdle had never served the Pierce County auditor. The litigation concluded on May 10. As a matter of law, Pierce County did not waive its defense of insufficient service of process. It asserted the defense early and consistently and engaged in no conduct inconsistent with the defense. As Pierce County did not waive the defense and was never served, the trial court never obtained personal jurisdiction over Pierce County and lacked authority to address the merits of Vannausdle's claims. It was required to dismiss the case on this ground.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

PENOYAR, A.C.J.